Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1150–05 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
5 FEBRUARY 2014

Building and Construction Law — Common property — Determining common property — Whether developer had absolute discretion to determine which parts of building was common property — Whether developer may de-designate common property unilaterally — Strata title for common property registered in developer's name by fraud or misrepresentation

Building and Construction Law — Maintenance — Joint Management Body ('JMB') — Locus standi — JMB a body corporate — Whether JMB has locus standi to sue developer to claim ownership of area identified as common property — Building and Common Property (Maintenance and Management) Act 2007

Civil Procedure — Appeal — Fresh or new issue not raised in trial proper or memorandum of appeal — Adducing of — Whether litigant allowed to raise issue of locus standi not raised or pleaded at first instance — Locus standi — Declaration, application for — Whether applicant had sufficient interest in subject matter of application to be clothed with locus

Evidence — Presumption — Adverse inference under s 114(g) of the Evidence Act 1950 — Failure to call rebuttal evidence — Whether justified invocation of adverse presumption — Evidence Act 1950 s 114(g)

Land Law — Common property maintenance fee — Management office — Whether whole floor on which management office located in residential apartment common property — Whether developer should surrender common property to joint management body ('JMB') — Whether JMB has locus standi to claim ownership of common property — Building and Common Property (Maintenance and Management) Act 2007

Land Law — Indefeasibility of title and interests — Fraud or misrepresentation — Strata title for common property in high rise residential apartment registered in

developer's name — Strata title procured by fraud and/or misrepresentation — Whether strata title defeasible

The appellant was the developer of a high rise mixed commercial development known as the Waldorf & Windsor Tower Service Apartments ('the W&W Tower'). The respondent was the joint management body ('JMB') established on 18 January 2009 pursuant to the provisions of the Building and Common Property (Maintenance and Management) Act 2007 ('the Act') to manage the W&W Tower. The appellant claimed that the respondent had trespassed onto a part of the 7th floor of the W&W Tower by occupying it as its management office ('the disputed area'). The appellant claimed to be the registered owner of the whole of the 7th floor of the W&W Tower by virtue of a strata title issued on 24 January 2011. The respondent denied trespass and claimed that the disputed area was part of the common property and as such the respondent as the JMB had the legal right to occupy the same. The appellant thus prayed for: (i) an order that the area concerned was owned by the appellant and that the respondent had trespassed thereunto; (ii) a mandatory injunction to compel the respondent to remove its management office and to restore the disputed area to its original position; and (iii) damages for trespass. The respondent sought for, inter alia: (i) a declaration that the right, title and interest in and to the said area was not indefeasible; (ii) a declaration that the registration of the said area in the appellant's name was obtained by way of fraud or misrepresentation; (iii) an order that the entry in the registration of land title in favour of the appellant in respect of the said area be cancelled; (iv) an order that the entire of the said area formed part of the common area and that it should be registered in the name of the respondent for common facilities. The High Court dismissed the appellant's claim and allowed the respondent's counterclaim. The appellant appealed against the whole of the said decision. The main issues in this appeal were: (i) whether the appellant's strata title in respect of the 7th floor included the disputed area that is, whether the whole of the 7th floor was commercial or common property; (ii) whether the respondent as the JMB had the locus standi to challenge the appellant's claim to ownership of the whole of the 7th floor including the disputed area; (iii) whether the appellant's strata title was defeasible on the ground of fraud and/or misrepresentation; (iv) whether the respondent had trespassed onto the disputed area; and (v) whether the respondent was liable to pay damages for trespass.

Held, dismissing the appeal and allowing the appeal on the counterclaim in part:

(1) The appellant did not expressly plead in its statement of claim nor in its defence to the counterclaim that the respondent did not have locus standi. The respondent's witnesses were not cross-examined on it. The lack of locus was also not raised in the appellant's written submission and submission in reply in the High Court and neither did the appellant

A expressly include it as a ground of appeal in its memorandum of appeal. The issue of the lack of locus under the Act read with the Strata Titles Act was raised for the first time in the appellant's written submission in the appeal. Hence, the appellant was precluded from raising the locus standi point for the first time in the appeal. An appeal court will not allow an B appellant to argue a ground that has not been pleaded in its memorandum of appeal (see paras 31–33).

(2) The respondent had, in any event, the locus standi. The respondent being a creature of statute established under s 4(1)(b) of the Act was a body C corporate having perpetual succession and a common seal. Accordingly the respondent may sue and be sued in its name. The respondent had the power under the scope of its duties and jurisdiction to challenge the appellant's claim to the whole of the 7th floor including the disputed area as its property not being common property (see paras 37–38).

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(3) The respondent did not have a registered interest in a parcel but as the JMB having the capacity to sue, the respondent had the locus to seek a declaration that the appellant's strata title was procured by fraud and/or misrepresentation. As the respondent was seeking a declaration in its E counterclaim, it need only show a sufficient interest to be clothed with locus (see paras 41 & 43).

(4) The disputed area formed part of the common property of the W&W Tower as the whole of the 7th floor was initially planned and approved as F a floor for common facilities and that the building plans for the 7th floor did not provide for any commercial area. If the 7th floor had indeed been intended to be a commercial area to be sold at some point in time, it would have been part of the stock in trade of the appellant and entered into its accounts as such. DW6, the managing director of the appellant G when subpoenaed as a witness was unable to produce the accounting records of the appellant to show that the disputed area was part of the appellant's stock in trade (see para 55(a)(b)).

(5) The appellant had every opportunity to call rebuttal evidence to try to disprove the respondent's contention about the appellant's treatment of H the accounts and what actually constituted 'stock in trade'. Failure to call rebuttal evidence on this material fact justified invocation of adverse presumption under s 114(g) of the Evidence Act 1950 (see para 55(b)).

(6) The appellant did not have an absolute discretion to determine which I parts of the W&W Tower were common property pursuant to cl 43.1(f) of the sale and purchase agreement and which were not. The appellant did not have the right to 'de-designate' common property unilaterally some two to three years later and to convert it to private property. The appellant had wrongfully 'carved out' the disputed area out of the entire

area on the 7th floor and treated it as its own private property. The appellant had done so unilaterally and without the consent of the respondent (see para 55(c) & (g)).

(7) The appellant had obtained the strata title through fraud and/or misrepresentation perpetrated on the land office (and JUPEM) being the issuing authority. Had the land office not been wrongfully induced by the drawings and plans submitted by PW1 in respect of the whole of the 7th floor which included the disputed area, the land office would not have issued the strata title to the appellant. Hence, the right, title and interest in and to said area was not indefeasible (see para 55(k) & (m)).

(8) Since the appellant was not the rightful owner of the disputed area, the respondent had not committed trespass by constructing its management office in the disputed area and accordingly the respondent was not liable to pay any damages to the appellant (see para 56).

[Bahasa Malaysia summary

Perayu merupakan pemaju pembangunan komersial bangunan tinggi yang dikenali sebagai Servis Apartmen Menara Waldorf & Windsor ('Menara W&W'). Responden merupakan badan pengurusan bersama ('BPB') yang ditubuhkan pada 18 Januari 2009 menurut peruntukan Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007 ('Akta') untuk menguruskan Menara W&W. Perayu menuntut bahawa responden telah mencerobohi ke sebahagian tingkat 7 Menara W&W dengan menduduki pejabat pengurusannya (kawasan yang dipertikaikan). Perayu mendakwa dirinya sebagai pemilik berdaftar keseluruhan tingkat 7 Menara W&W menurut hak milik strata yang dikeluarkan pada 24 Januari 2011. Responden menafikan pencerobohan dan mendakwa bahawa kawasan yang dipertikaikan merupakan sebahagian daripada hartanah yang sama dan oleh itu responden sebagai BPB mempunyai hak yang sah untuk mendiami hartanah tersebut. Perayu oleh itu memohon untuk: (i) satu perintah bahawa kawasan yang berkenaan dimiliki oleh perayu dan bahawa responden telah mencerobohi ke atasnya; (ii) satu injunksi mandatori untuk memaksa responden untuk mengeluarkan pejabat pengurusannya dan mengembalikan kawasan yang dipertikaikan kepada kedudukan asalnya; dan (iii) ganti rugi untuk pencerobohan. Responden menuntut untuk, antara lainnya: (i) satu deklarasi bahawa hak, hak milik dan kepentingan di dalam dan kepada kawasan tersebut tidak boleh dinafikan; (ii) satu deklarasi bahawa pendaftaran kawasan tersebut di bawah nama perayu didapati melalui penipuan atau salah nyata; (iii) satu perintah bahawa kemasukan di dalam pendaftaran hak milik tanah bagi pihak perayu berhubung kawasan tersebut dibatalkan; (iv) satu perintah bahawa keseluruhan kawasan tersebut yang membentuk satu kawasan umum dan bahawa kawasan tersebut sepatutnya didaftarkan di bawah nama responden untuk kemudahan bersama. Mahkamah Tinggi menolak tuntutan perayu dan membenarkan tuntutan balas responden. Perayu merayu terhadap keseluruhan

keputusan tersebut. Isu-isu utama di dalam rayuan ini ialah: (i) sama ada hak milik strata perayu berhubung tingkat 7 termasuk kawasan yang dipertikai di mana, sama ada keseluruhan tingkat 7 merupakan hartanah komersial atau umum; (ii) sama ada responden sebagai BPB mempunyai locus standi untuk mencabar tuntutan perayu mengenai pemilikan keseluruhan tingkat 7 termasuk kawasan yang dipertikaikan; (iii) sama ada hak milik strata perayu boleh dinafikan atas alasan penipuan dan/atau salah nyata; (iv) sama ada responden telah menceroboh ke atas kawasan yang dipertikaikan; dan (v) sama ada responden bertanggungan untuk membayar ganti rugi untuk pencerobohan.

Diputuskan, menolak rayuan dan membenarkan sebahagian rayuan ke atas tuntutan balas:

(1) Perayu tidak secara terus memplid di dalam penyataan tuntutannya ataupun pembelaannya kepada tuntutan balas bahawa responden tidak mempunyai locus standi. Saksi-saksi responden tidak dibuat pemeriksaan balas mengenainya. Kekurangan locus juga tidak dikemukakan di dalam hujahan bertulis perayu dan hujahan balasan di Mahkamah Tinggi dan perayu juga tidak secara nyata memasukkannya sebagai satu alasan rayuan di dalam memorandum rayuannya. Isu kekurangan locus di bawah Akta dibaca bersama dengan Akta Hak Milik Strata dikemukakan buat pertama kalinya di dalam hujahan bertulis perayu di dalam rayuan. Oleh itu, perayu dihalang daripada membangkitkan poin locus standi buat pertama kali di dalam rayuan. Mahkamah rayuan tidak akan membenarkan perayu untuk menghujah satu alasan yang tidak pernah diplid di dalam memorandum rayuannya (lihat perenggan 31–33).

(2) Responden mempunyai, dalam apa-apa keadaan, locus standi. Responden merupakan entiti kepada statut yang ditubuhkan di bawah s 4(1)(b) Akta yang merupakan badan korporat yang kekal turun-temurun dan mempunyai satu meterai umum. Dengan itu responden boleh menyaman dan disaman di bawah namanya. Responden mempunyai kuasa di bawah skop kewajipannya dan bidang kuasa untuk mencabar tuntutan perayu untuk keseluruhan tingkat 7 termasuk kawasan yang dipertikaikan sebagai hartanahnya yang bukan merupakan hartanah umum (lihat perenggan 37–38).

(3) Responden tidak mempunyai kepentingan berdaftar di dalam kawasan tersebut tetapi BPB mempunyai kapasiti untuk menyaman, responden mempunyai locus untuk memohon deklarasi bahawa hak milik strata perayu didapati melalui penipuan dan/atau salah nyata. Memandangkan responden memohon deklarasi dalam tuntutan balasnya, ia hanya perlu menunjukkan kepentingan mencukupi berserta locus (lihat perenggan 41 & 43).

(4) Kawasan yang dipertikaikan membentuk sebahagian hartanah umum Menara W&W sebagai keseluruhan tingkat 7 yang pada awalnya dirancang dan diluluskan sebagai satu tingkat kemudahan umum dan bahawa pelan bangunan untuk tingkat 7 tidak memperuntukkan untuk mana-mana kawasan komersial. Sekiranya tingkat 7 benar-benar bertujuan dijadikan kawasan komersial untuk dijual pada suatu-suatu masa, ia akan menjadi sebahagian stok dagangan perayu dan oleh itu akan dimasukkan ke dalam akaunnya. DW6, pengarah urusan perayu apabila disepina sebagai seorang saksi tidak dapat mengemukakan rekod-rekod akaun perayu untuk menunjukkan bahawa kawasan yang dipertikaikan merupakan sebahagian daripada stok dagangan perayu (lihat perenggan 53(a)(b)).

(5) Perayu mempunyai segala peluang untuk memanggil keterangan bantahan untuk cuba menyangkal dakwaan responden mengenai layanan akaun perayu dan apa yang sebenarnya merupakan 'stok perdagangan'. Kegagalan untuk memanggil keterangan bantahan menjustifikasikan penggunaan anggapan berlawanan di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 55(b)).

(6) Perayu tidak mempunyai pertimbangan muktamad untuk menentukan bahagian mana Menara W&W yang merupakan hartanah umum menurut klausa 43.1(f) perjanjian jual dan beli dan yang mana bukan. Perayu tidak mempunyai hak untuk 'menentukan semula' hartanah dua hingga tiga tahun kemudian dan menukarnya menjadi hartanah peribadi. Perayu secara salah 'melorekkan' kawasan yang dipertikaikan daripada keseluruhan kawasan di tingkat 7 dan menjadikannya sebagai hartanah peribadinya. Perayu telah berbuat demikian secara unilateral dan tanpa kebenaran responden (lihat perenggan 55(c)(g)).

(7) Perayu telah memperoleh hak milik strata melalui penipuan dan/atau salah nyata yang dilakukan di pejabat tanah (dan JUPEM) sebagai pihak berkuasa yang mengeluarkan. Sekiranya pejabat tanah tidak secara salah dikelirukan oleh lukisan dan pelan-pelan yang dikemukakan oleh PW1 berhubung keseluruhan tingkat 7 yang termasuk kawasan yang dipertikaikan, pejabat tanah tidak akan mengeluarkan hak milik strata kepada perayu. Oleh itu, hak, hak milik dan kepentingan di dalam dan kepada kawasan tersebut tidak boleh dinafikan (lihat perenggan 55(k) & (m)).

(8) Memandangkan perayu bukanlah pemilik berhak kawasan yang dipertikaikan, responden tidak melakukan pencerobohan dengan mendirikan pejabat pengurusannya di dalam kawasan yang dipertikaikan dan dengan itu, responden tidak bertanggungan untuk membayar sebarang ganti rugi kepada perayu (lihat perenggan 56).]

Notes

For a case on adverse inference under s 114(g) of thr Evidence Act 1950, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

For a case on fraud or misrepresentation, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3533.

For a case on fresh or new issue not raised in trial proper or memorandum of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1201.

For a case on maintenance fee, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2981.

Cases referred to

Attorney General of Hong Kong v Zauyah Wan Chik & Ors and Another Appeal [1995] 2 MLJ 620, CA (refd)

Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd [2004] 4 CLJ 793, CA (refd)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29, CA (refd)

Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd [2007] 4 MLJ 128; [2007] 2 CLJ 25, CA (refd)

KGV Associates Sdn Bhd v The Co-Operative Central Bank Ltd [2006] 5 MLJ 513, CA (refd)

Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517, FC (distd)

Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors [2013] 1 MLJ 61, CA (refd)

Russian Commercial and Industrial Bank v British Bank For Foreign Trade Ltd [1921] 2 AC 438, HL (refd)

Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)

YAB Dato' Dr Zambry bin Abd Kadir v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24; [2009] 4 CLJ 253, FC (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 ss 2, 4(1), 4(1)(b), (2), (3), (4), 8, 8(1), (2)
Evidence Act 1950 s 114(g)
Income Tax Act 1967 s 24(2)(a)
National Land Code ss 89(a), 92(1), 340, 340(2)(a), 417
Rules of Court 2012 O15 r 16
Specific Relief Act 1950 s 41
Strata Titles Act 1985 ss 16(6), 39(1), 40A, 42, 67, 67A, 67A(1)

Appeal from: Civil Suit No 22 NCVC-460 of 2011 (High Court, Kuala Lumpur)

Wong Kian Kheong (Karen Lee with him) (Wong Kian Kheong) for the appellant.
Kamarul Hisham Kamaruddin (Loke Pooi Gee, Koh Sock Pio and Lim Kon Keen with him) (L P Gee & Co) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] The appellant is a developer and the registered owner of a plot of land on which a high rise mixed commercial development known as the Waldorf & Windsor Tower Service Apartments ('the W&W Tower') has been built.

[2] The respondent is the joint management body established on 18 January 2009 pursuant to the provisions of the Building and Common Property (Maintenance and Management) Act 2007 ('the BCP (M&M) Act') to manage the W&W Tower.

[3] The appellant claimed that the respondent had trespassed onto a part of the 7th floor of the W&W Tower by occupying it as its management office ('the disputed area'). The appellant claimed to be the registered owner of the whole of the 7th floor of the W&W Tower by virtue of a strata title issued on 24 January 2011 and that the disputed area is privately owned by them and is not common property.

[4] The respondent denied the trespass and claimed that the disputed area is part of the common property and as such the respondent as the joint management body of the W&W Tower has the legal right to occupy the same.

[5] The appellant contended that as the disputed area did not form part of the common property, it had lawfully given notice to the respondent to quit and deliver up possession of the disputed area.

[6] In the statement of claim, the appellant prayed for declaratory reliefs, to wit, that the area marked 'A' in Lampiran 1 annexed to the statement of claim is owned by the appellant and that the respondent had trespassed onto 'area A'. The appellant also sought for a mandatory injunction to compel the respondent to remove its management office and to restore the disputed area to its original position (see para 7(a)(ii) of the statement of claim). The appellant also claimed for damages for trespass onto 'area A' to be assessed together with interests and costs.

A [7] The respondent in its amended defence and counterclaim sought for, inter alia, a declaration that the right, title and interest in and to 'area A' is not indefeasible and a declaration that the registration of 'area A' in the appellant's name was obtained by way of fraud or misrepresentation. The respondent also sought for an order that the registrar of land title cancels the appellant's entry in B the registration of land title in favour of the appellant in respect of 'area A'. The respondent also counter claimed for an order that the entire 'area A' forms part of the common area and that it should be registered in the name of the respondent for common facilities for the benefit and enjoyment of the residents of the W&W Tower.

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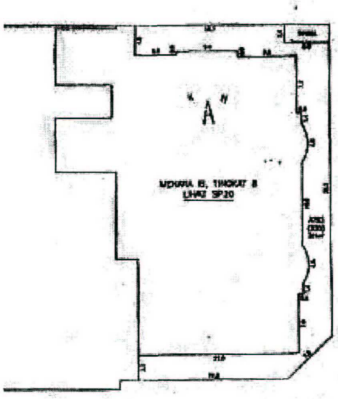
[8] For ease of reference and identification of the area marked 'area A' in Lampiran 1 annexed to the statement of claim claimed by the appellant; the area shown in the strata title plan issued to the appellant and the disputed area claimed as common property by the respondent are shown in the respective D plans reproduced as follows:

Plan 1 - Plan of "Area A" in Lampiran 1 annexed to the Statement of Claim

E



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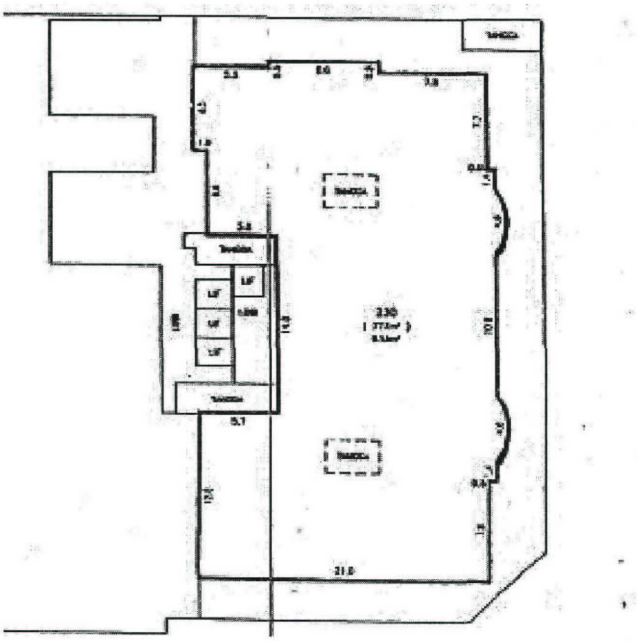
Plan 2- Strata Title Plan



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Plan 3 - Plan showing the Disputed Area

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Disputed Area

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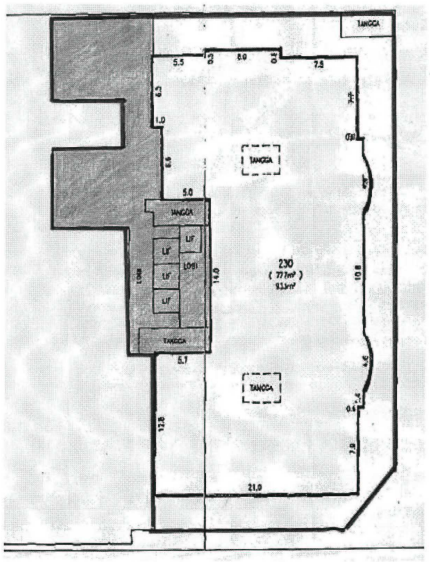
Strata Title Plan area

Area A in Lampiran 1 annexed to Statement of Claim

D



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[9] In Plan 1 the perimeter delineated in bold is the area marked 'area A' in Lampiran 1 annexed to the statement of claim. In Plan 2 the perimeter delineated in bold is the area in the strata title plan (see *rekod rayuan jilid* 2(1)/4 p 294) and in Plan 3 the perimeter shaded in grey is the disputed area.

[10] The movie room, karaoke room, the walkway in front of the two rooms, lifts, lift lobby and stairwell are located in the shaded area in Plan 3 which are within the disputed area.

[11] It is the respondent's case that the appellant is claiming the whole of the 7th floor being the area marked 'area A' in Lampiran 1 annexed to the statement of claim which is an area larger than the area shown in the strata title plan.The difference is the shaded area shown in Plan 3 which the appellant claimed the respondent had trespassed onto (see para 18(a)(ii) of the statement of claim).

DECISION OF THE HIGH COURT

[12] After a full trial wherein the appellant called four witnesses and the respondent called eight witnesses, the learned trial judge after hearing the evidence and submissions held that the appellant had failed to prove its case on a balance of probabilities and that the respondent had succeeded in establishing its counterclaim. Accordingly, the appellant's claim was dismissed and the respondent's counterclaim in prayers 23 (a), (b), (c), (d) and (e) namely:

(a) a declaration that the right title and interest in and to Area 'A' of Level 7 of Waldorf & Windsor Tower registered in the platintiffs name under Geran 59219, Lot 56229, Tingkat 8, Petak 230 Mukim Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur is not indefeasible;

(b) a declaration that the registration of Area 'A' in the plaintiff's name is obtained by way of fraud or misrepresentation;

(c) an order that the registrar of land title to cancel the entry in the Registration of Land Title in favour of the plaintiff;

(d) an order that Area 'A' forms part of the common area registered in the name of the defendant for common facilities for the benefit and enjoyment of the residents at Waldorf & Windsor Tower;

(e) costs.

were allowed with costs of the claim and counterclaim to be borne by the appellant. Costs were fixed at RM30,000 by the learned trial judge after hearing submissions from both counsel.

Being dissatisfied with the decision of the learned trial judge the appellant appealed against the whole of the said decision.

ISSUES FOR DETERMINATION BY THE COURT ON APPEAL

[13] The main issues in this appeal were as follows:

(a) whether the appellant's strata title in respect of the 7th floor of the W&W Tower includes the disputed area that is, whether the whole of the 7th floor is commercial or common property;

(b) whether the respondent as the joint management body of the W&W Tower has the locus standi to challenge the appellant's claim to ownership of the whole of the 7th floor including the disputed area;

(c) whether the appellant's strata title is defeasible on the ground of fraud and/or misrepresentation;

(d) whether the respondent has trespassed onto the disputed area claimed by the appellant as its property;

(e) whether the respondent is liable to pay damages for trespass.

DECISION OF THE COURT OF APPEAL

[14] Upon reading the record of appeal and the written submissions of counsel for the appellant and respondent and upon hearing the oral submissions of counsel aforesaid, the court unanimously decided to dismiss the appeal against the order of the High Court dismissing the claim and allowing the appeal on the counterclaim in part that is, to vary the order of the High Court to the extent that the orders in paras 23 (a) and (b) of the counterclaim were allowed and the orders in paras 23 (c), (d) and (e) of the counterclaim were set aside, with no order as to costs. The deposit was ordered to be refunded to the appellant.

THE APPEAL

[15] Being dissatisfied with the decision of the court, the appellant now seeks leave to appeal to the Federal Court.

[16] It will be noted however that the respondent has not similarly applied for leave to cross-appeal against the order setting aside part of the order of the

High Court on the counterclaim.

GROUNDS OF DECISION

Issue 1: Whether the appellant's strata title in respect of the 7th floor of the W&W Tower includes the disputed area that is, whether the whole of the 7th floor is commercial or common property

[17] In the statement of claim the appellant prayed for a declaration that 'area A' in Lampiran 1 annexed to the statement of claim is owned by the appellant. In support of its claim the appellant relied on the strata title issued by the land office in respect of the 7th floor of the tower. This was the only issued strata title produced and relied on by the appellant.

[18] A perusal of Lampiran 1 annexed to the statement of claim will show that the claim of the appellant to 'area A' actually encompasses the whole of the 7th floor including the disputed area whereas the strata title plan limits the area for which the strata title is issued to the area demarcated with a line in bold as shown in Plan 2 above. It can be clearly seen that the shaded area in Plan 3 above which is the disputed area, does not form part of the area included in the strata title.yet the appellant is claiming ownership or a proprietary right to the shaded area as well. Simply put, the appellant is claiming for an area which is not included in the strata title that it relies on.

[19] Lampiran 1 annexed to the statement of claim forms part of the pleadings of the appellant. It is trite that the appellant is bound by its pleadings. In this case, the identity of the area over which the appellant claims ownership is fundamental and basic to its claim. And although the identity of the area claimed by the appellant was challenged by the respondent during trial and raised in submissions before the learned trial judge, the appellant chose not to amend its statement of claim.

The shaded area in Plan 3 which is the disputed area, not included in the area shown in the strata title plan, is claimed by the respondent as common property. This area comprises of the movie room, karaoke room, lifts etc and the respondent's management office.

[20] On this point of demarcation of the disputed area, not being part of the area shown in the strata title plan alone would have been a sufficient ground for the court to dismiss the appellant's appeal as the appellant was praying for a declaration that it owned the whole of the 7th floor including the disputed area when there was no evidence of title to it.

[21] However, some confusion may have been caused by counsel for the

respondent, who in para 82 of his written submission seemed to suggest that apart from PW1('the licensed surveyor'), being instructed by the appellant to apply for the strata title for 'area A' (which would have included the disputed area) for 'purposes of their own keeping and gain', the appellant also applied to the land office for a strata title to be issued in respect of the disputed area *within* 'area A'. However, there is no evidence adduced (of which the court is made aware of) to show that a separate title to the disputed area has in fact been applied for and issued.

[22] Counsel for the appellant in para 28(h) of his written submission referred to the proposed strata plan for the 7th floor of the W&W Tower appearing in pp 450 and 460 of *rekod rayuan jilid* 2(2). It will be observed that the Plan in p 450 (exh SP10) is a general plan of the 7th floor while the Plan in p 460 (exh SP20) contains details of the 7th floor with measurements of the disputed area specified. It was stated by PW1 in evidence that the Plan in p 450 (exh SP10) is the general layout plan of the 7th floor of the W&W Tower whereas the Plan in p 460 (exh SP20) shows the detailed floor plan of the disputed area. This exh SP10 is the same plan annexed to the statement of claim referred to as Lampiran 1 above. However it will be noted that no reference was made by counsel for the appellant that the disputed area is the subject matter of or is embodied in a separate strata title.

[23] Without sight of a separate strata title to prove that the disputed area belongs to the appellant and is not common property, much weight must be given to the contention by the respondent that the disputed area does not form part of the 'area A' referred to in Lampiran 1 annexed to the statement of claim.

The only reasonable conclusion on the 'identity' of the disputed area that can be drawn from the above is that it does not belong to the appellant and is thus common property.

Issue 2: Whether the respondent as the Joint Management Body of the W&W Tower has the locus standi to challenge the appellant's claim to ownership of the whole of the 7th floor including the disputed area

[24] Counsel for the appellant submitted that the respondent has no locus standi to challenge the indefeasibility of the strata title of the appellant on the grounds that the respondent was only established as an interim body under s 4(1) of the BCP (M&M) Act which will have to be dissolved on the formation of a management corporation of the W&W Tower under s 39(1) of the Strata Titles Act 1985; that the respondent would be acting in conflict of interest in challenging the indefeasibility of the strata title and that any dispute under the Strata Titles Act can only be brought by a person having a registered interest in a parcel.

[25] It is not in dispute that a management corporation has not been formed to date and as such the respondent can still exercise its duties and powers under s 8(1) and 8(2) of the BCP (M&M) Act respectively.

[26] Counsel for the appellant contended that the purpose of the BCP (M&M) Act as spelt out in its preamble is 'to provide for the proper maintenance and management of buildings and common property, and for matters included thereto' and that the Act does not give a joint management body any right to challenge the developer's determination of common property nor the right to challenge the validity of the strata title issued.

[27] It was also contended that the respondent cannot have the locus standi to challenge the strata title because to do so will place the respondent in a position of conflict of interest as the respondent is comprised of the appellant as developer and purchasers (see s 4(4) of the BCP (M&M) Act). In short, it was submitted that the respondent cannot be seen to be challenging its own member.

[28] Further, it was contended that any dispute under the Strata Titles Act can only be brought by a person having a registered interest in a parcel and not by the respondent which does not have a registered interest in any parcel as it is not a purchaser.

[29] The court having considered carefully the contentions of counsel for the appellant and the respondent on the locus standi point, is of the view that the respondent has the necessary locus to challenge the appellant's claim to ownership of the whole of the 7th floor including the disputed area.

[30] To begin with, it will be noted that the appellant did not expressly plead in its statement of claim nor in its defence to the counterclaim that the respondent does not have locus standi. During trial, the respondent's witnesses were not cross-examined on it. The lack of locus was also not raised in the appellant's written submission and submission in reply in the High Court and neither did the appellant expressly include it as a ground of appeal in its memorandum of appeal. The issue of the lack of locus under the BCP (M&M) Act read with the Strata Titles Act was raised for the first time in the appellant's written submission in this appeal.

[31] Counsel for the appellant had submitted that the appellant had raised the issue of lack of locus from the earliest that is, in para 14(i) of its statement of claim (*rekod rayuan bahagian A jilid* 1, p 21). Paragraph 14(i) reads:

A (i) memaklumkan Defendan bahawa Kawasan A dimiliki Plaintif dan defendan tidak mempunyai apa-apa kawalan, possessi dan bidang kuasa ke atas Kawasan A kerana ia bukan sebahagian daripada harta bersama

With respect, para 14(i) merely refers to the 'control, possession and power' of
B the respondent in respect of 'area A'. It does not speak of the locus of the respondent as a joint management body to challenge the indefeasibility of the strata title of the appellant.

[32] In our judgment the appellant is precluded from raising the locusstandi
C point for the first time in this appeal. It is trite that an appellant is precluded by law from raising a point in an appeal which has not being pleaded or raised in evidence during trial. It is well settled that the Court of Appeal will not, save in limited cases, entertain a point of law not taken at first instance or a point not
D canvassed in the court below as was stated by Justice Gopal Sri Ram JCA (as he then was) in the case of *Hj Ali bin Hj Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29 (CA). The rationale for this ruling is quite obvious in that the issue not having been raised in the court below, was not challenged by the respondent nor considered and ruled upon by the trial judge.

E

[33] The appellant did not include the lack of locus as a ground in its memorandum of appeal and neither did it apply to amend the memorandum of appeal to do so. There is a plethora of weighty decisions that an appeal court will not allow an appellant to argue a ground that has not been pleaded in its
F memorandum of appeal as a matter of essential justice, that is justice to the court below and to the respondent who would have to defend a judgment of the High Court on an unpleaded ground of appeal (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; *Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd* [2007] 4 MLJ 128; [2007] 2
G CLJ 25; *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793 and the recent case of *Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors* [2013] 1 MLJ 61).

[34] Counsel for the appellant had argued that the appellant had pleaded the
H lack of locus as a ground in para 13 of its memorandum of appeal. Para 13 reads:

Pesuruhjaya Kehakiman terkhilaf apabila membuat penemuan undang- undang bahawa Responden diperbadankan untuk melindungi kepentingan bersama
I pemilik-pemilik Parsel Bangunan tersebut. Dalam pada ini, Pesuruhjaya Kehakiman terkhilaf apabila gagal mempertimbangkan fakta bahawa tanggungjawab dan kuasa responden terhad kepada peruntukan-peruntukan di bawah Seksyen 8 Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007 ('Akta 663').

[35] Again with respect, it will be noted that para 13 of the memorandum of appeal merely refers to the 'responsibility and the limited power of the respondent' under s 8 of the BCP (M&M) Act. The appellant did not expressly plead that the respondent did not have the capacity to sue and the locus to challenge the indefeasibility of the strata title of the appellant.

[36] Counsel for the appellant referred to the case of *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 (FC) for the proposition that even 'when a question of law was raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it was not only competent but expedient, in theinterests of justice, to entertain the plea'. We are however of the view that *Lim Geak Liang* can be distinguished from the present case. Firstly, the Court of Appeal is not a court of last resort for the appellant and secondly there was no admission or proof beyond controversy of facts pertaining in this case. In the final analysis, the court has a discretion to determine whether to consider a point which was not raised at the trial but was raised for the first time in the appellate court. This discretion should be exercised only after careful scrutiny of the facts and circumstances of the case.

[37] Be that as it may, the court is of the view that on the facts and the law the respondent has, in any event, the locus standi in this case. The respondent being a creature of statute established under s 4(1)(b) of the BCP (M&M) Act is a body corporate having perpetual succession and a common seal (s 4(2) of the BCP (M&M) Act). Accordingly the respondent may sue and be sued in its name (s 4(3) of the BCP (M&M) Act).

[38] The respondent is also empowered under s 8 of the BCP (M&M) Act 'to do such things as may be expedient or necessary for the proper maintenance and management of the building'. In our judgment, the respondent is not limited to mere maintenance and management of the W&W Tower but also to ascertain and determine the overall common property areas of the W&W Tower that need maintenance and management. A fortiori, the respondent will have the power under the scope of its duties and jurisdiction to challenge the appellant's claim to the whole of the 7th floor including the disputed area as its property not being common property. The use of the management office located within the disputed area will be part and parcel of the respondent's duty to maintain and manage the W&W Tower. Since the respondent is mandated by the purchasers, an issue not in dispute, to challenge the appellant on its claim, it will necessarily follow that the respondent has the locus to challenge the appellant on the validity of the strata title issued.

[39] Even as an interim body the respondent has the locus to sue in the meantime as the management corporation has not been formed to date.

[40] The court does not see any conflict of interest arising in this suit merely because the respondent is taking an action against the appellant, which is a member of the respondent. This is because the respondent and appellant are separate entities under the law and there is no prohibition against the respondent from taking action against the appellant when the latter has acted unlawfully to the detriment of the purchasers acting through the respondent. Taking the appellant's argument to its logical conclusion will result in an absurd situation where a joint management body cannot have any recourse against the developer for any clear breaches of its obligations merely because the developer is also a member of the joint management body. This resulting scenario will clearly be an affront to the BCP (M&M) Act read with the Strata Titles Act, the main purpose of which is to protect the interests of purchasers. If the appellant's contention is correct and followed then the converse should likewise apply and that is, the appellant should be precluded from suing the respondent as the appellant is a member of the respondent. This surely cannot be a correct proposition in law.

[41] The respondent in challenging the validity of the strata title is proceeding under s 340 of the National Land Code and not under s 67A(1) of the Strata Titles Act. Thus the appellant's contention that 'any dispute under the Strata Titles Act can only be brought by a 'proprietor' being a person or body having a registered interest in a parcel' is misplaced. Granted, the respondent does not have a registered interest in a parcel but as the joint management body of the W&W Tower having the capacity to sue, we are of the view that the respondent has the locus to seek a declaration that the appellant's strata title was procured by fraud and/or misrepresentation.

[42] The Strata Titles Board while determining a dispute under s 67 of the Strata Titles Act does not have the jurisdiction to invalidate a strata title issued in respect of a parcel and/or to determine whether a certain area of a building is common property. On the other hand, the court has the jurisdiction under s 417 of the National Land Code to order the registrar or any land administrator to do all such things that may be necessary to give effect to any judgment or order.

[43] Lastly, the court is of the view that as the respondent is seeking a declaration in its counterclaim, it need only show a sufficient interest to be clothed with locus (see *Russia Commercial and Industrial Bank v British Bank of Foreign Trade Ltd* [1921] 2 AC 438).

[44] The respondent has a real and not only a theoretical question for determination by the court. It has a real interest to raise it and the appellant as the proper contradictor has the interest to oppose the declaration sought. The determination of whether the disputed area is common property is a real issue

to be determined, the result of which will determine whether the respondent can rightly discharge its duties/powers under s 8 of the BCP (M&M) Act over the disputed area.

[45] Section 41 of the Specific Relief Act 1950 and O15 r 16 of the Rules of Court 2012, unlike s 67A of the Strata Titles Act do not limit the respondent's recourse to remedy in disputes where the claimant must be a proprietor of a parcel (see *YAB Dato' Dr Zambry bin Abd Kadir v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24; [2009] 4 CLJ 253 (FC) and *Attorney General of Hong Kong v Zauyah Wan Chik & Ors and Another Appeal* [1995] 2 MLJ 620).

Issue 3: Whether the appellant's strata title is defeasible on the ground of fraud and/or misrepresentation

[46] Central to this issue is whether the 7th floor of the W&W Tower including the disputed area is a commercial area belonging to the appellant or common property belonging to the purchasers and the appellant.

Section 2 of the BCP (M&M) Act defines 'common property' as:

> … in relation to a development area, means so much of the development area as is not comprised in any parcel, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures and fittings, lifts, refuse chutes, refuse bins, compounds, drains, water tanks, sewers, pipes, wires, cables and ducts that serve more than one parcel, the exterior of all common parts of the building, playing fields and recreational areas, driveways, car parks and parking areas open spaces, landscape areas, walls and fences, and all other facilities and installations and any part of the land used or capable of being used or enjoyed in common by all the occupiers of the building

[47] Counsel for the appellant submitted that the learned trial judge failed to consider the following which clearly showed that the disputed area belongs to the appellant namely:

(a) the submission drawing and as-built drawing of the disputed area was approved by DBKL without any amendments;

(b) upon completion of construction, the appellant submitted plans for the subdivision of the W&W Tower for the purpose of issuance of the strata title for the individual parcels. The proposed strata plans were prepared by PW1;

(c) the application for subdivision was duly approved by the Director of Lands and Mines, Federal Territory Land Office confirming that the proposed strata plans were in order;

A (d) as all requirements under the Strata Titles Act for the issuance of the strata title were complied with by the appellant, the strata title for the whole of the 7th floor including the disputed area was then prepared, registered and issued to the appellant; and

B (e) the land office and Jabatan Ukur dan Pemetaan (JUPEM) had both approved the proposed strata plans and neither had at any time requested and/or directed the appellant to amend any of its plans.

[48] Counsel for the appellant also submitted that the respondent had failed C to adduce any evidence to prove that the respondent had an existing proprietary right to the disputed area; that the appellant had a dishonest intention to cheat the respondent of its proprietary right to the disputed area and that the appellant had defrauded the respondent by registering the strata title in the appellant's own name thereby depriving the respondent of a D proprietary right over the disputed area.

[49] In response to the allegation of mistakes in the building plans and/or proposed strata plans, the appellant submitted that the mistakes, if any, are not grounds to render the strata title defeasible. Further, even if the appellant had E been negligent in the preparation of the building plans and/or the proposed strata plans, the alleged negligence did not amount to fraud (see *KGV Associates Sdn Bhd v The Co-Operative Central Bank Ltd* [2006] 5 MLJ 513).

[50] The strata title is conclusive evidence of the appellant being the F registered proprietor under s 89(a) of the National Land Code read with s 16(6)of the Strata Titles Act.

The appellant has an indefeasible interest in the land under s 92(1) of the National Land Code and has the right to subdivide the W&W Tower which is built on the land. G

[51] The respondent had also alleged that the strata title was obtained by the appellant by way of misrepresentation and that misrepresentation in the context of s 340(2)(a) of the National Land Code must mean fraudulent misrepresentation (see *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC H 491).

[52] Counsel for the appellant contended that the learned trial judge erred in arriving at the decision that the disputed area was common property and that I the appellant had 'defrauded the purchasers of Waldorf & Windsor Tower by unilaterally carving out the disputed area for the appellant's own use' for the following reasons:

(a) the learned trial judge failed to consider that the respondent was not a purchaser of any parcel who had relied on the sales brochure;

(b) there was no evidence before the court that the disputed area shown in the building plans was designated to be a floor for facilities ear-marked for a 'commercial spa' and that such area constituted common property;

(c) that the tower is a commercial development and not a residential development; and

(d) DW7 agreed in cross-examination that the sales brochure did not say that the facilities shown in the brochure were located at the 7th floor of the W&W Tower.

[53] It was the appellant's case that there is no evidence proved beyond reasonable doubt that the strata title was obtained by way of fraud and/or misrepresentation.

[54] On the other hand the respondent contended that the 'area A' which includes the disputed area shown in Lampiran 1 annexed to the statement of claim, is in law and in fact common property by reason of the following grounds. Briefly they are:

(a) in the submission of the submission drawing (1) to Dewan Bandaraya Kuala Lumpur (DBKL) in 2001 seeking approval for the development of the floor Plan for 'area A', the drawing included a green area, library, nursery and management office which are common facilities. The said floor Plan also contained lifts, lift lobby, stairwell and walkway in front of the lifts which are common property by definition under s 2 of the BCP (M&M) Act. The appellant did not intend 'area A' to be a commercial area privately owned by it;

(b) a development order was issued on 20 June 2002 thus approving the submission drawing;

(c) the submission drawing (2) submitted as a requirement of the development order and approved on 28 October 2003 showed a largely similar floor plan;

(d) the sales brochure read with the sale and purchase agreement (see cl 12.1 of the sale and purchase agreement) show the floor plan in the sales brochure to comprise of, inter alia, the karaoke room, gymnasium, aerobic/dancing room and landscaped garden, all of which are defined in the Fourth Schedule of the sale and purchase agreement as common facilities;

(e) the sales brochure and submission drawing (2) are part of the sale and purchase agreement and were deemed inspected and accepted by the purchasers. no location plan was shown in the Second Schedule of the sale and purchase agreement although referred to in Recital E thereof. The only location plan available was in the sales brochure;

(f) the common facilities and common property are located in the podium as shown in submission drawing (2). The podium is in fact the 7th floor of the W&W Tower;

(g) the submission drawing (2) and the sales brochure do not show or describe 'area a' as parcel. a parcel has been defined in cl 43.1 (i) as:

> 'Parcel' means one of the individual units comprised in the said Building herein contracted to be sold and purchased and described in Section 3 of the First Schedule and outlined in red in the floor plan annexed hereto together with the accessory parcel

as such, 'area A' including the disputed area was meant to be common property with common facilities;

(h) the disputed area consists of the main sewerage, firewater piping, ventilation fan, ducting for stairwell and fire pump room. The disputed area must of necessity be common property as the respondent must have access to this area to carry out maintenance of the facilities;

(i) the appellant's own plans do not provide for any commercial area at the 7th floor. All the approved commercial areas are located at the Ground floor, the 1st and 2nd floors, not at the 7th floor;

(j) there is no commercial electric power meter installed by the appellant in 'area A';

(k) at all material times, the 7th floor of the W&W Tower has been designated as a floor for common facilities. ('Kemudahan' as shown in the various submission drawings and plans);

(l) the facilities in 'area A' are not 'additional facilities' owned by the appellant as claimed. They are common facilities. The facilities to be paid for by the purchasers upon use are the additional facilities within the meaning of cl 15.2 of the sale and purchase agreement and are not common facilities;

(m) according to PW1 'area A' was meant to be sold later by the appellant and not meant to be provided as additional facilities;

(n) no evidence has been adduced to show that 'area A' has been included or is to be transferred to form part of the appellant's fixed assets (s 24(2)(a) of the Income Tax Act 1967). There is no evidence to show the purported claim of ownership of 'area A' by the appellant from the accounting/taxation perspective;

(o) fraud/misrepresentation on the part of the appellant; and

(1) After the sale and purchase agreements were signed, the

development order (2) was obtained. In it the commercial area is restricted to the ground, 1st and 2nd floors. It does not include the 7th floor;

(2) submission drawing to amend submission drawing (2): the total of the commercial area does not include the floor area of the 7th floor (the Podium) at all. The floor area designated as commercial by the appellant in the period before and after the sale and purchase agreements remained the same;

(3) The appellant applied for the strata title to 'area A' which includes the disputed area, on its own and without notice to the respondent or to purchasers of individual parcels;

(4) The appellant has unilaterally reclassified the disputed area as 'commercial' without the approval of DBKL;

(5) In its application for the strata title, the appellant misrepresented to the land office and JUPEM that 'area A' which included the disputed area belonged to them. PW1, the surveyor, had testified that he was instructed by the appellant to apply for the strata title for 'area A' which included the disputed area, so that the appellant could sell it later; and

(6) There is no legal basis whatsoever for the appellant to claim that the disputed area does not form part of the common property of the W&W Tower.

(p) The appellant does not have the right to unilaterally 'de-designate' an area which is common property from 'time to time' and convert it to private property after a sale and purchase agreement has been entered into under cl 43.1(f) of the sale and purchase agreement. Clause 43.1(f) only provides for the designation 'from time to time' of common property over land but not over the building.

FINDINGS ON ISSUE 3

[55] Having perused and evaluated the evidence adduced in this case and having considered the lengthy submissions of counsel for the appellant and the respondent, the court arrived at the following findings:

(a) the disputed area formed part of the common property of the W&W Tower as the whole of the 7th floor was initially planned and approved as a floor for common facilities ('Tingkat Kemudahan') and that the building plans for the 7th floor did not provide for any commercial area. (Refer to submission drawing and the as-built drawing in *Rekod Rayuan* 2(3), pp 655 and 657);

(b) if the 7th floor had indeed been intended to be a commercial area to be sold at some point in time, it would have been part of the stock in trade of the appellant and entered into its accounts as such. DW6, the managing director of the appellant when subpoenaed asa witness was unable to produce the accounting records of the appellant to show that the disputed area was part of the appellant's stock in trade. The respondent had correctly discharged its evidential burden by calling DW6 to produce the accounts. Although DW6 was not personally in charge of the accounts and neither was hethe financial controller or auditor, he was the managing director of the appellant and was in a position to do so but did not.

The appellant would have known before trial that the respondent had subpoenaed DW6 as a witness. The appellant thus had every opportunity to call rebuttal evidence to try to disprove the respondent's contention about the appellant's treatment of the accounts and what actually constituted 'stock in trade' under s 24(2)(a) of the Income Tax Act 1967. The appellant itself would have been in the best position to explain whether the disputed area was treated as common property or was to be treated as commercial area in their books. This is because the appellant as the developer would have all its areas in the development recorded as stock in trade for the purposes of its business activities. If the disputed area had been excluded from common property for the appellant's own use, then the area should be reflected as part of its fixed assets and equivalent value would have to be declared as its income for tax purposes. Failure to call rebuttal evidence on this material fact would justify the invocation of the adverse presumption rule under s 114(g) of the Evidence Act 1950.

(c) the appellant does not have an absolute discretion to determine which parts of the W&W Tower are common property pursuant to clause 43.1(f) of the sale and purchase agreement and which are not, that is, the appellant does not have the right to 'de-designate' common property unilaterally some two to three years later and to convert it to private property;

(d) the evidence clearly shows that the appellant's sales brochure which is to be read with the sale and purchase agreement, had represented that the disputed area was reserved for 'Luxurious Facilities' including a spa and spa pool as can be seen in the submission drawing and the as-built drawing;

(e) the commercial areas of the W&W Tower are located on the Ground, 1st and 2nd floors only as shown in the plans. No commercial area was to be located on the 7th floor;

(f) there is no electric commercial power meter installed by the appellant as developer for the disputed area. The only commercial power meter to note is the one installed on the 7th floor (Block A Waldorf Tower) in respect of the cooling tower and water pump for Taylors' College Sri Hartamas which are located on the lower floor. Without any other commercial power meters being installed on the 7th floor shows that the appellant did not intend to treat the disputed area as a commercial area in the first place;

(g) the court agrees with the finding of the learned trial judge that the appellant had wrongfully 'carved out' the disputed area out of the entire area on the 7th floor and treated it as its own private property. The appellant had done so unilaterally and without the consent of the respondent;

(h) the appellant's sales brochure, which is to be read with the sale and purchase agreement, clearly shows that the common facilities area are to be located on the whole of the 7th floor and not just within the area delineated in the strata title plan. While the facilities are to be located on the 7th floor, the commercial areas are to be found on the ground floor, 1st and 2nd floors only. Both DW7 and DW8 who are purchasers of units in the W&W Tower have testified that before they purchased their respective units, it was represented to them that the recreational facilities would be located at the common areas on the 7th floor;

(i) as this court finds that the entire 7th floor had been initially designated as common property, the appellant is not at liberty to invoke cl 43.1(f) of the sale and purchase agreement to de-designate the disputed area and convert it to its own use. The appellant is bound by the sales brochure read with the sale and purchase agreement and the law to uphold what had been originally planned and approved namely, that the disputed area is common property. Once the purchasers had been given vacant possession of their respective parcels the performance of the sale and purchase agreements was complete. The appellant cannot be seen to be allowed to have any reservation of rights to be exercised 'from time to time' subsequently for its own benefit;

(j) from the drawings and plans submitted, it will be noted that there is a garden running alongside the perimeter of *Lampiran* 1 annexed to the statement of claim. If the whole of the 7th floor is treated as private property and therefore belonging to the appellant, it would appear that this garden will not be accessible to the residents and owners of the parcels in the Tower. It is not difficult to see why the learned trial judge said in his grounds of judgment that 'common sense suggest that common facilities are provided on common property. It is hard to imagine common facilities being housed or hosted on private property'. The approved drawings and plans clearly support the respondent's contention that the 7th floor had all along been designated as common property housing the various common facilities. There is no evidence to show that the relevant authorities had agreed to any amendment to the drawings and plans to the 7th floor to exclude the disputed area as common property;

(k) in our judgment we are of the view that the appellant had obtained the strata title through fraud and/or misrepresentation perpetrated on the land office (and JUPEM) being the issuing authority. Had the land office not been wrongfully induced by the drawings and plans submitted by PW1 in respect of the whole of the 7th floor which included the disputed area, it is without doubt that the land office would not have issued the strata title to the appellant.

It must be remembered that DW1 and DW2 from the land office had testified that the land office does not carry out field checks but relies on the confirmation from JUPEM that the said application for strata title is in order. DW3 and DW5 from JUPEM in turn testified that the site visit carried out by JUPEM officers was merely to check the boundaries at random and that JUPEM largely relies on the proposed strata plans prepared by a surveyor. In this case, JUPEM and the land office both relied on the drawings and plans submitted by PW1 the surveyor on behalf of the appellant. PW1 in turn had admitted in evidence that he had been instructed by the appellant to include the disputed area forming part of the 7th floor wholly belonging to the appellant so that the strata title can be issued. There is no just cause or legal basis for the appellant to apply for a strata title to the disputed area as well when all along the disputed area was intended and acknowledged by the appellant to be common property. The purchaser who was deemed to have inspected the building plan and location plan at the time of purchase had every legitimate right to expect the appellant to keep the whole of the 7th floor as common property;

(l) it is also incorrect for counsel for the appellant to submit that no strata titles are issued for common properties. Section 40A of the Strata Titles Act provides that after the issuance of the strata titles by the land office, the strata titles ought to be transferred by the original proprietor to parcel

owners. And s 42 of the same Act provides that the management corporation shall, on coming into existence, become the proprietor of the common property and be the custodian of the issue document of title of thecommon property; and

(m) the court has no issue with the submission of counsel for the appellant that for the claim of fraud to succeed in the context of s 340(2)(a) of the National Land Code, it must be proved to be actual and not constructive or equitable fraud on the part of the person where title or interest is being impeached. lt must involve dishonesty of somesort which was committed prior to or at the time of registration (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81). Here, in the present case the court is satisfied beyond reasonable doubt that the appellant is guilty of fraud and/or false misrepresentation (and not just through mistake or negligence) when it submitted the drawings and plans effectively showing to the land office and JUPEM that the disputed area had been included as part of the whole of the 7th floor of the W&W Tower belonging to the appellant.

The court therefore declares that the right, title and interest in and to 'area A' is not indefeasible.

ISSUES 4 AND 5

Whether the respondent has trespassed onto the disputed area claimed by the appellant as its property and whether the respondent is liable to pay damages for trespass

[56] It follows from the decision of the court on issue 3 that as the appellant is not the rightful owner of the disputed area, the respondent has not committed trespass by constructing its management office in the disputed area and accordingly the respondent is not liable to pay any damages to the appellant.

CONCLUSION

[57] In the result, the appellant's appeal against the decision on the claim was dismissed and the order on the counterclaim varied. The order in respect of the

prayers in paras 23 (a) and (b) of the counterclaim were confirmed whilst the prayers in paragraphs 23 (c), (d) and (e) were set aside. Each party was ordered to bear its own costs.

Appeal dismissed and appeal on counterclaim in part allowed.

Reported by Kanesh Sundram